IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR.

JUDGMENT

S.B.Civil Writ Petition No.375/1996

Sumati Lal Banthia. vs. Union of India & Ors.

Date : 26.9.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.Anjay Kothari, for the petitioner.

Mr.KK Bissa, for the respondents.

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BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

Brief facts of the case are that one Smt. Rajkumari Maloo expired on 7.6.1957. She was regularly assessed under the provisions of Income Tax Act and Wealth Tax Act by the I.T.O., Bikaner. She had no son but had one daughter Bhanwari Bai who was married to Shri Manmal Kothari. Smt. Bhanwari Bai had pre-deceased Smt. Rajkumari Maloo. Smt. Bhanwari Bai had two daughters – Kanchan Bai and Kamla Bai and two sons - Jethmal and Ajaypal. It is said that Smt. Rajkumari

adopted one Chorulal as his son but unfortunately, said Chorulal died. It was alleged that a will was executed by Smt. Rajkumari in her life time on 5.6.1951. In the said will, Smt. Rajkumari's brother – Champalal Banthia was the executor named. Said Shri Champalal Banthia submitted petition before this Court for obtaining probate upon which S.B.Civil Testamentary Case No.2/1969 was registered. In that testamentary proceedings, said Chorulal submitted caveat and opposed the grant of probate for the will dated 5.7.1951. In the said proceedings, an issue was framed whether Chorulal was validly adopted by Smt. Rajkumari on 12.2.1951 through her husband Balchand as well as the issue whether Smt. Rajkumari executed the will dated 5.7.1951. Since the matter was contested, therefore, the issues were decided after contest and this Court after recording evidence of the parties, decided issue no.1 and declared that Chorulal was legally adopted by Smt. Rajkumari on 12.2.1951. On question of execution of the will dated 5.7.1951, this Court held that the applicant failed to prove the due execution of the will. With these findings, the probate petition was dismissed by this Court vide order dated 7.9.1977.

It appears that since Smt. Rajkumari left the estate after her death, therefore, proceedings under Section 58(3) of the Estate Duty Act, 1953 (for short 'the Act of 1953') were initiated for assessment of the

estate duty in the hands of the persons to whom the property devolved. In that proceedings, a notice was issued under Section 58(2) of the Act of 1953 to Shri Champalal Banthia on the ground that he is person accountable under Section 53 of the Act of 1953. It appears from the copy of the order passed by the Assistant Controller of Estate Duty, Rajasthan, Jaipur dated 6.3.1974 that said Champalal submitted return of estate of deceased declaring the value of estate at Rs.7,64,537/-. It appears till the order was passed by the said authority on 6.4.1974, the probate proceedings were not decided by this Court. Shri Champalal was treated to be accountable person being executor of the will and, therefore, the demand was raised against said Shri Champalal. The above order was subjected to appeal before the Appellate Controller of Estate Duty who vide order dated 31.3.1982 remanded the matter back to Assistant Controller of Estate Duty.

Appeals were preferred by Champalal Banthia as well as Ajaypal Kothari and by the Controller of Estate Duty, Jodhpur against the order passed by Appellate Controller of Estate Duty before the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur. Both these appeals were dismissed by the order of the Appellate Tribunal dated 23.11.1985. Copy of order of the Appellate Tribunal, though was not produced by either of the parties, but has been shown today during the

course of arguments. It appears from the said order that the Appellate Tribunal despite the judgment of this Court made certain observations which are not in consonance with the judgment of this Court passed in the probate proceedings which is a judgment in rem as was passed under the provisions of Indian Succession Act. Be it as it may be, this issue will not detain us further because of the reason that the liability as such of anybody including of Champalal Banthia is not under challenge. The liability and its character is the main subject matter of dispute. The dispute arose because of the reason that said Champalal Banthia died and thereafter, the petitioner received notice Annex.4 from the Income Tax department issued under Section 221 (1) of the Income Tax Act, 1961 wherein it is stated that an amount of Rs.29,21,411/- are due and it appears that the said amount was demanded by issuing notice in the name of Champalal Banthia being accountable person of Smt. Rajkumari. Champalal Banthia expired on 1.4.1987, therefore, Champalal's son – Sumati Lal Banthia (present petitioner) responded to notice Annex.4 dated 31.3.1988 and stated that he has no concern with the said demand. It is also stated that Shri Champalal Banthia was executor of will of late Smt. Rajkumari and was party only because he was executor of the will. It is also stated that Smt. Rajkumari had adopted Chorulal as her son who was the

only legal representative of Smt. Rajkumari. It appears that the petitioner also preferred appeal against the order passed under Section 58(3) of the Act of 1953 before the Appellate Controller of Estate Duty, Jodhpur. In that appeal, he submitted an application for adjournment but that was rejected by the Appellate Controller of Estate Duty vide order dated 30.10.1995 and consequently, the appeal of the petitioner was dismissed. The petitioner, therefore, has approached this Court by filing this writ petition to challenge the recovery notice Annex.4 and sought relief of restraint order against the respondent from recovering amount of estate duty in question from the petitioner and for declaration that the petitioner is not liable in respect of estate of late Smt. Rajkumari Maloo.

Learned counsel for the petitioner submitted that the accountable persons under Section 53 of the Act of 1953 are well defined and the executor of the will is not a person accountable under any of the provisions of the Act of 1953. The persons who are accountable are the persons to whom any property passes on the death of the deceased which includes every legal representative to whom such property so passes for any beneficial interest in possession or in whom any interest in the property so passing is at any time vested ; every trustee, guardian, committee or other person of the

nature mentioned above and the persons managing the property of the deceased as well as the persons to whom any interest in the property vested by way of alienation or other derivative title. It is submitted that the executor of the will cannot be held liable and in this case, even the petitioner's father Champalal Banthia did not get any share under the will alleged to have been executed by Smt. Rajkumari on 5.7.1951. Apart from above, Champalal Banthia was only executor of the will and right of the executor is neither heritable or transferable nor it can devolve upon the legal representative of the executor in any manner.

The notice was issued to the petitioner only because of the reason that he is son of executor of the will. It is also submitted that in fact, after the decision of this Court in probate proceedings no.2/69 dated 7.9.1977, Shri Champalal Banthia cannot be considered to be an executor of the will. The judgment of this Court dated 7.9.1977 was delivered under the provisions of Indian Succession Act and is judgment in rem and is binding upon whole of the World and, therefore, the respondents are also bound by the said judgment. It is submitted that even if under wrong assumption of law or misinterpreting the judgment of this Court, any liability was created against Shri Champalal Banthia, then also, the same was illegal and without jurisdiction as contrary to the decision of

this Court.

Learned counsel for the respondents vehemently submitted that the executor of the will is a person who entitled to intermeddle with the properties of the deceased and thereby he is a person in the capacity of trustee and, therefore, is accountable person under Section 53 of the Act of 1953. It is also submitted that Section 53 also includes the persons who may not have lawful title vesting in them but who received the property or remained in possession of the property also. It is also submitted that even as per Section 303 of the Indian Succession Act, 1922 (for short 'the Act of 1922'), a person may become the executor by his own wrong. In this case, admittedly, deceased Champalal Banthia dealt with the properties of deceased Smt. Rajkumari Maloo and this fact is an admitted fact. Therefore, liability has been created by Section 304 of the Act of 1922 which very clearly provides that when a person has so acted as to become an executor of his own wrong, then he is answerable to the rightful executor or administrator or to any creditor or legatee of the deceased. In this case, Champalal Banthia himself submitted return before the authority concerned and, therefore, he cannot say that he was not liable or accountable person under Section 53 of the Act of 1953. Further the issue has been decided against deceased

Champalal and it has been held that he is accountable person and that order passed became final and, therefore, the petitioner cannot challenge the liability of Champalal which was created by lawful order. In view of the above reasons, notice was rightly issued to the petitioner after the death of Shri Champalal. Further, it is submitted that the petitioner's contention that he has not received any property of deceased of Smt. Rajkumari through Champalal or otherwise is a question of fact which cannot be decided in the present writ petition as the writ petition has been preferred against the order dismissing the appeal by the appellate authority for which was dismissed want of prosecution. It is submitted that the respondent department has every right to recover the revenue from the persons who are liable to pay. In the alternative, it is submitted by learned counsel for the respondents that at the most, the matter can be remanded back so that the claim of the petitioner can be examined by the competent authority to find out whether he is liable to any property of Smt. Rajkumari or not.

I considered the submissions of learned counsel for the parties and perused the facts of the case.

So far as the liability of Shri Champalal is

concerned, for that it is not in dispute that he acted as executor without obtaining probate and in probate proceedings, this Court held that the will has not been proved. Said judgment of this Court passed in Testamentary Case No.2/1969 dated 7.9.1977 is a judgment in rem and binding upon all whether party in the proceedings or not. Shri Champalal himself relied upon the will and submitted the probate petition, then that was because of the reason that he was under impression that he has lawful authority to act as the executor of the will. During this period, if he acted upon the will and distributed the assets of Smt. Rajkumari to the beneficiaries under the will, then also, Shri Champalal never received any property of deceased Smt. Rajkumari nor he was in possession of the property except otherwise than being trustee for the lawful beneficiary. Said Champalal, therefore, cannot be held to be the executor of will in the eye of law.

Section 53 of the Act of 1953 defines the accountable persons wherein the legal representatives to whom the property of deceased passes for any beneficial interest in possession or in whom any interest in the property so passing is at any time vested as well as every trustee, guardian, committee or other person in whom any interest in the property so

passing or the management thereof is at any time vested as well as every person in whom any interest in the property vested in possession by alienation or other derivative title, are accountable persons. The executor in some sense may be persons having the management of the property vesting in him but the question is that the person must be having some interest vested in him and the executor cannot be said to be the person having interested vested in him in the property. The trustee, guardian or committee or any beneficiary and who are in management of the property vested as such in them are also persons accountable. Sub-clauses (a), (b) and (c) of Sub-Section (1) of Section 53 clearly provides that there must be vesting of interest or have possession also along with title of the property.

Sub-Section (2) of Section 53 starts with a non-obstante clause that notwithstanding any contained in Sub-Section (1) of Section 53 where an heir-at-law proves to the satisfaction of the Controller that some other person is in adverse possession of any assets of the deceased, the heir-at-law shall not be accountable for the portion of the estate duty payable in respect of such assets. There is a proviso attached to Sub-Section (2) of Section 53 which says that such person shall become accountable if he subsequently recovers possession of such assets. Apart from this Sub-Section (2) of Section 53 where right has been given to the

heir-at-law to prove that though the property was belonging to the deceased but other's rights have been created by adverse possession and he may be accountable only when he recovers the property, there is another proviso appended to Sub-Section (1) of Section 53 which says that nothing as provided in Sub-Section (1) of Section 53 shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of the property. Then harmonious construction as well as actual meaning of the provision is firstly vesting of interest in the property on account of death of deceased makes the person accountable. The other provisions have been made so as to secure that under the garb of representative capacity, other person if intermeddled with the property of the deceased, then the estate duty may be recovered from the property of the deceased which may come in the hands of such trustees, guarantees, committee, etc. In this case, the petitioner undisputedly is son of the executor and not even executor of the will in question which was not found proved and probate has been rejected by this Court by judgment dated 7.9.1977.

The revenue tried to take help of Sections 303 and 304 of the Act of 1922. It may be true that Shri Champalal Banthia may be treated to be a person “executor of his own wrong”, then the liability which

can be fastened upon the alleged executor under Section 304 is liability to the rightful executor or administrator or to any creditor or to legatee of the deceased. Section 304 of the Act of 1922 gives a right to the above referred persons to recover the assets of the deceased in the hands of the alleged executor and this merely recognises the lawful rights of those persons who are lawfully entitled to the property. When the Estate Duty Act of 1953 itself has defined who are the persons entitled, then the revenue cannot make applicable Section 304 for holding the person liable to pay estate duty only because of reasons of Sections 303 and 304.

Since the petitioner himself is not challenging the liability of estate duty on the properties left by deceased Smt. Rajkumari Maloo nor he can challenge the liability, his contention is that he did not receive any property of Smt. Rajkumari in any manner directly or indirectly or through his father, then his right is only to show that he has not received any property of the deceased in any manner.

The petitioner's appeal was dismissed by the appellate authority despite the fact that adjournment was sought by the petitioner. It is true that the appellate authority could have dismissed the appeal for non-prosecution but in the peculiar facts of the case,

that the petitioner if has not received the property of the deceased directly or indirectly, then demand notice issued in the name of only his father who already died before the demand notice (Annex.4) was issued, then he deserves to be given opportunity to prove his case that he is not liable to pay any amount under any of the order passed by the authorities.

In view of the above discussion, this writ petition is allowed, the order of the Appellate Controller of Estate Duty, Jodhpur dated 30.10.1995 is set aside and the matter is remanded to the respondent no.2 – Assistant Controller of Estate Duty, Bikaner.

The petitioner may submit his all objections afresh if he has not submitted the objections before the respondent no.2 and has preferred the appeal straightaway against the demand notice. The respondent no.2 may consider the plea of the petitioner in accordance with law and by keeping in mind the observations made above. The petitioner shall appear before the respondent no.2 on 29.10.2007 and the liability if of the petitioner is found, then obviously shall be limited to the extent of the estate received by the petitioner.

(PRAKASH TATIA), J.

S.Phophaliya